No. 80-920

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTH SHORE HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(3) of the National Labor Relations Act by denying to union-represented employees improvements in wages and benefits granted to unrepresented employees in order to punish them for selecting union representation, and properly ordered petitioner to make the employees whole for the discrimination against them.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 630 F. 2d 40. The decision and order of the Board (Pet. App. 14a-74a) is reported at 245 N.L.R.B. No. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 75a) was entered on September 18, 1980. The petition for a writ of certiorari was filed on December 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act are set forth at Pet. 2-4.

STATEMENT

Following a hearing before an Administrative Law Judge, the Board found that petitioner ("the Hospital") violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing, from about September 16, 1977 to March 22, 1978, to bargain over wages and other economic benefits unless and until the Union,[1] the representative of an appropriate unit of Hospital employees, agreed to reductions in certain other existing benefits, and, in addition, by refusing after March 22, 1978, to bargain in good faith with respect to wages (Pet. App. 60a-61a). The Board also found that the Hospital violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding from unit employees, from October 1, 1977 to about April 24, 1978, the wage increases and insurance premium benefit which had been granted to non-unit employees, in order to discourage the unit employees' membership in the Union (Pet. App. 66a-67a). The Board's order requires the Hospital,

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[1]Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO.

inter alia, to bargain in good faith with the Union upon request, to embody any understanding reached in a signed agreement, and to make the unit employees whole for losses suffered by reason of the discrimination found to have been committed against them (*id.* at 67a-70a). The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-13a).

The Hospital here challenges only the Board's finding that the refusal to grant the retroactive wage increase and insurance premium benefit violated Section 8(a)(3) of the Act, and the Board's order requiring the Hospital to make the employees whole for that violation. The relevant facts are these:

1. The Union represents a unit of technical employees, who comprise approximately 100 of the Hospital's 1,200 employees and are the only ones represented by a union (Pet. App. 2a, 22a). Negotiations for a new contract began in July, 1977; twenty-one bargaining sessions were held over the ensuing nine months, but no agreement was reached (*id.* at 2a, 23a, 51a).

In September 1977, the Hospital budgeted increases for all its employees, including unit members. The increases were implemented on October 1, 1977, for all employees except those represented by the Union (Pet. App. 2a, 11a n.4, 37a, 60a). Nevertheless, the Hospital's negotiators insisted until March, 1978, that they would not discuss raises for unit employees until the Hospital's demands for changes in the contract were resolved. When the Hospital finally abandoned this position on March 22, 1978, it offered the budgeted raise to the Union, but flatly refused to make it retroactive, thereby permanently putting unit employees six months in arrears of the other employees who had received the raise on October 1 (*id.* at 3a, 46a-47a).

Hospital spokesmen explained that their refusal to consider retroactivity was not based on economic considera-

for 3

tions, because allowance the full pay raise had been made in the budget (Pet. App. 11a, 47a, 49a; Tr. 113, 117).[2] A Hospital spokesman asserted that retroactivity was being denied because of "the Union's decision last fall not to extend the contract[,] * * * the length of bargaining, * * * and other [unspecified] things that had gone on outside of the bargaining room" (Pet. App. 49a; Tr. 119). The spokesman further asserted that the Hospital would have made its wage offer "last fall, if [the Union] simply had been agreeable to the proposals which the Hospital had on the table" (Pet. App. 50a; Tr. 122). Another Hospital spokesman explained that "to grant retroactivity would not motivate the Union in future years to negotiate a contract on a timely basis" (Pet. App. 46a).

The Administrative Law Judge, whose decision was adopted by the Board, found that the denial of retroactivity "cannot be justified as serving any legitimate interests of the [Hospital], * * * [and] plainly had a natural and foreseeable effect of chilling employees' desires for Union representation" (Pet. App. 66a). He noted that, although the Hospital contended that its actions were designed to procure a swift conclusion to the negotiations, it was the Hospital's refusal to bargain in good faith that prolonged the negotiations (*id.* at 64a-65a). He concluded that the Hospital's refusal "was motivated in substantial part by a desire to punish the unit employees because they had chosen Union representation" (*id.* at 65a).

2. The court of appeals agreed with the Board that the Hospital had not established any legitimate reason for denying to the unit employees the benefits granted to the non-union employees. The court stated (Pet. App. 11a-13a; footnotes omitted):

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[2]"Tr." references are to the transcript of the hearing before the Board.

The Hospital made it clear during negotiations, and does not now deny, that inability to pay was not the reason for its refusal to make its wage offer retroactive to October 1, 1977. Rather, the Hospital's stated reasons were the Union's refusal in September 1977 to extend the existing collective bargaining contract—which refusal held open the threat of a Union strike and led to the administrative dilemma of having no contract to utilize in dealing with employees—and the potential impact of granting retroactivity on future negotiations.

* * * * *

We start with the second alleged justification—the Hospital's desire to discourage needlessly drawn out negotiations. We do not pass on the question whether, after unduly prolonged negotiations during which the employer bargained in good faith, an employer's refusal to extend retroactively to unit employees a wage increase granted similarly situated non-unit employees may be justified by the length of or conduct during bargaining sessions. Here, however, the Board could conclude that it was the Hospital's unlawful piecemeal bargaining strategy, not the Union's conduct, which produced the protracted negotiations. The Hospital cannot invoke its deterrent rule to punish the Union for the Hospital's misconduct.

The Hospital's first justification similarly fails. The Union's refusal to agree to extend the existing contract for any significant length of time occurred while the Hospital's bad faith bargaining strategy was ongoing. The Hospital's alleged dilemma of having no contract to utilize was, in view of its bad faith refusal to make a wages and benefit counterproposal, much of its own making, and blame cannot be shifted to the Union.

Finally, the court rejected the Hospital's assertion, in purported reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), that the Board's make whole order was in excess of its authority. The court explained (Pet. App. 13a n.7) that:

> The *H. K. Porter Co.* case dealt with the Board's authority to remedy section 8(a)(5) violations. The make whole order here is to remedy a section 8(a)(3) violation. It is a standard type remedy in discrimination cases and does not exceed the Board's authority.

ARGUMENT

Petitioner challenges the Board's finding that the Hospital's refusal to grant the retroactive wage increase and insurance benefit to the unit employees was motivated by antiunion considerations (Pet. 7-13). Petitioner asserts that the finding of antiunion motivation rests upon the Hospital's refusal to grant a concession at the bargaining table—*i.e.*, its refusal to recede from its unlawful insistence that noneconomic issues be resolved before discussing economic issues. Thus, petitioner argues, the Board's finding of a Section 8(a)(3) violation and the order requiring that the unit employees be compensated for the withheld benefits are contrary to Section 8(d) of the Act, which provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." This claim rests on an erroneous premise.

Neither the Board nor the court below found that the withholding of benefits violated Section 8(a)(3) of the Act because the Hospital engaged in piecemeal bargaining. Rather, the Section 8(a)(3) violation was based on the Hospital's intention, as revealed in its spokesmen's statements, to punish the unit employees because of the Union's refusal to capitulate to the Hospital's concededly unlawful bargaining procedure. The fact that the Union's conduct at the bargaining table may have prompted the Hospital's antiunion

motivation is irrelevant. Had the Hospital refused to give the unit employees benefits given to unrepresented employees in order to penalize them for having chosen union representation at a time when negotiations for a collective bargaining agreement were not being conducted, the Board unquestionably could have found that the refusal violated Section 8(a)(3) of the Act, and could have prescribed a make whole order. The fact that the Hospital was at the same time engaging in unlawful bargaining tactics does not alter the Board's power to remedy the Hospital's unlawfully motivated treatment of the unit employees.[3]

Petitioner's reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is misplaced. In that case, the employer, for antiunion reasons, refused to agree to a "check-off" clause requiring it to deduct union dues from its wage payments to employees who were union members. The Court, although sustaining the Board's finding that the employer had refused to bargain in good faith in violation of Section 8(a)(5) of the Act, held that Section 8(d) barred the Board from requiring that the employer agree to a check-off clause. In *Porter*, the union was not entitled to a check-off clause unless the employer agreed to provide it in the collective bargaining agreement. Here, however, as we have shown, the Hospital's disparate treatment of the unit employees would have been unlawful even if there had been

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[3]The Hospital's reliance (Pet. 13) on *B.F. Goodrich Co.*, 195 N.L.R.B. 914, 915 (1972), and *Production Molded Plastics, Inc.*, 227 N.L.R.B. 776 (1977), enforced, 604 F. 2d 451 (6th Cir. 1979), is misplaced. In *Production Molded Plastics*, the Board explained that it does not necessarily follow that a layoff is discriminatory merely because an employer unlawfully refused to bargain about it. Rather, because the refusal to bargain may be unlawful for reasons other than antiunion motivation, such motivation must be established independently in order to prove a Section 8(a)(3) violation. Similarly, in *B.F. Goodrich*, the Board held that, where no evidence was adduced showing a discriminatory intent in withholding benefits from unit employees, no violation of Section 8(a)(3) was established. In the present case, the record supports the Board's finding of discriminatory intent.

no request by the Union for bargaining. In these circumstances, the employees' right to be made whole exists apart from any agreement that the Hospital and the Union would have reached.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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